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BEFORE THE ARIZONA CORPORATION COMMISSION

CARL J. KUNASEK
CHAIRMAN
JIM IRVIN
COMMISSIONER
RENZ D. JENNINGS
COMMISSIONER

IN THE MATTER OF THE PETITION OF MCIMETRO ACCESS TRANSMISSION SERVICES, INC. FOR ARBITRATION OF THE RATES, TERMS, AND CONDITIONS OF INTERCONNECTION WITH U S WEST COMMUNICATIONS, INC., PURSUANT TO 47 U.S.C. § 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996.	DOCKET NO. U-3175-96-479 DOCKET NO. E-1051-96-479
IN THE MATTER OF THE PETITION OF AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, AND CONDITIONS WITH U S WEST COMMUNICATIONS, INC., PURSUANT TO 47 U.S.C. § 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996.	DOCKET NO. U-2428-96-417 DOCKET NO. E-1051-96-417

AT&T'S SUPPLEMENTAL BRIEF IN RESPONSE TO PROCEDURAL ORDER DATED JULY 30, 1997

AT&T Communications of the Mountain States, Inc. ("AT&T") provides the following supplemental brief pursuant to the Arbitrators' Procedural Order requiring additional consideration of "the issues of combinations of network elements and whether 1FB, 1FR or other finished service can be requested as an unbundled network element, in light of the recent Court of Appeals 8th Circuit Opinion" in Iowa Utils. Bd. v. Federal Communications Comm'n, Nos. 96-3321, et al., 1997 WL 403401 (8th Cir. July 18, 1997) ("Eighth Circuit Decision").

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I. INTRODUCTION

U S WEST Communications, Inc. ("U S WEST") seeks to use the Eighth Circuit Decision as a vehicle for reopening an issue that has already been resolved in this arbitration: namely, the requirement that U S WEST provide AT&T with unbundled elements in existing combinations so that AT&T can use those elements to provide local service to its customers. The Eighth Circuit Decision does not require reconsideration of this issue. To the contrary, that decision supports the Arbitrators' resolution of this issue and the Federal Communications Commission's ("FCC's") interpretation of the Telecommunications Act of 1996 ("Act").

U S WEST's proposal to provide the unbundled network elements only separately, requiring AT&T to then recombine the elements itself -- even if that means recombining the elements in the same combination that U S WEST had previously employed -- not only violates the FCC Rules and the Act, but would also needlessly inflate AT&T's costs, degrade service quality, and effectively preclude AT&T and other new entrants from using unbundled network elements to provide Arizona consumers the benefits of lower prices and innovative services promised by the Act. The Arbitrators and the Commission should once again deny U S WEST's transparent attempts to undermine the Act, the FCC Rules, and the benefits of local telecommunications service competition.

II. DISCUSSION

A. THE EIGHTH CIRCUIT DECISION DOES NOT ALTER U S WEST'S OBLIGATION TO PROVIDE REQUESTING CARRIERS WITH ACCESS TO NETWORK ELEMENTS IN EXISTING COMBINATIONS.

The Act establishes that U S WEST and other incumbent local exchange carriers

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("ILECs") have a "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis . . . in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3) (1996) (emphasis added). The FCC interpreted that provision, in part, to require: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b) (1996). The FCC explained that this rule "bars incumbent LECs from separating network elements that are ordered in combination." In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, First Report and Order, ¶ 293 (Aug. 8, 1996) ("FCC Order").

Consistent with the Act and the FCC Rules, the Arbitrators have required that U S WEST provide unbundled network elements to AT&T either individually, or as they are currently combined, in a form that will allow AT&T to use those elements to provide local exchange service to Arizona consumers. MCIm Order, p.11 at Issue 14 and AT&T Order, p. 13 at Issue 25. On July 24, 1997, after the Eighth Circuit issued its Decision, the parties revised the contract language addressing this issue at the Arbitrators' request. The arbitrated interconnection agreement between U S WEST and AT&T now specifically reflects the requirements of the Eighth Circuit Decision. Interconnection Agreement, Attachment 3, § 1.2.2 & Attachment 5, § 3.2.15.1.

The Eighth Circuit Decision provides no basis on which to reopen the Arbitrators' decision or to revise the interconnection agreement any further. The Eighth Circuit Decision

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vacated only subsections (c) through (f) of FCC Rule 51.315 which require the ILEC to recombine network elements not ordinarily combined in the ILEC's existing network. Eighth Circuit Decision at *25 & n.39. The Eighth Circuit, however, did not vacate Rule 51.315(b), which prohibits the ILEC from uncombining network elements if the requesting carrier seeks to purchase them as they are currently combined. The Eighth Circuit Decision, therefore, does not alter the FCC requirement that U S WEST provide a requesting carrier with unbundled network elements that are currently combined in U S WEST's network.[1]

B. THE EIGHTH CIRCUIT CONFIRMED THE ACT'S REQUIREMENT THAT U S WEST MUST ALLOW COMPETITORS TO USE UNBUNDLED NETWORK ELEMENTS TO PROVIDE FINISHED SERVICES.

U S WEST nevertheless has asked the Arbitrator to reopen the issue of whether, in light of the Eighth Circuit Decision, U S WEST is required to provide AT&T with unbundled network elements in existing combinations in order to provide local exchange service. U S WEST can offer no basis on which the issue should be reopened, and the Arbitrator should deny U S WEST's request to reconsider a decision that is already consistent with federal and state law. U S WEST's request is nothing more than an attempt to preclude AT&T and other new entrants from using U S WEST unbundled network elements to provide local service.

Initially, U S WEST has distorted the issue of the effect of the Eighth Circuit Decision by framing it as whether 1FR, 1FB, or other finished services are themselves

[1] At the Arbitrators' request, during the Commission's public meeting on July 30, 1997, AT&T, MCImetro and U S WEST attempted to agree on contract language clarifying the specific requirements of the Eighth Circuit Decision and Rule 51.315(b). AT&T proposed a revision to Attachment 5, § 3.2.15.1 which used wording taken directly from the Decision and Rule. This proposal is attached as Exhibit 1. To the extent that the Arbitrators or the Commission believe that clarification is necessary (a position with which AT&T does not concur) the language of Exhibit 1 should be incorporated into the Interconnection Agreement.

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network elements that can be requested by a competing carrier. The real issue here is whether the Eighth Circuit Decision overturns the FCC requirement that U S WEST provide unbundled network elements in any existing combination to requesting carriers -- i.e., how unbundled network elements are to be provided to requesting carriers, not whether a particular finished service can be considered to be an unbundled network element.

U S WEST insists that it is not obligated to provide elements that comprise 1FR, 1FB, or other services in existing combinations if those combinations would allow competitors to offer those services. To the extent that U S WEST is thereby asking the Arbitrators to prohibit AT&T from providing local service through a combination of U S WEST network elements, the Eighth Circuit Decision precludes that argument and upholds the FCC requirement that U S WEST permit such use. As the court explained, "the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network." Eighth Circuit Decision at *26. The court also held that "'inexpensive rates" for network elements do not "violate the Act's purposes," for "facilities-based competition" was not "the Act's exclusive goal." Id. at *27-28. The court dismissed the incumbents' claims that purchasing access to the entire network would evade either the statutory pricing standard for resale or the Act's joint marketing restriction.[2] Id. at 27. The

[2] It should also be noted that the forward-looking prices that the Act requires AT&T to pay for network elements already reflect the incidental costs associated with the incumbent's initial combination for itself of network elements that are currently combined in its network. In this regard, forward-looking cost estimates on which individual network element rates are based reflect not only the costs of an entire end-to-end network, but also operating and maintenance expenses that include the technicians and equipment used in the ordinary course to connect facilities in the ordinary course. Thus, as the Eighth Circuit noted, a requesting carrier incurs "combination" costs even when it offers services entirely through network

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court further held that "[s]imply because [an ILEC's] capabilities can be labeled as 'services' does not [mean] that they were not intended to be unbundled as network elements." Id. at *21.

In sum, U S WEST cannot use the Eighth Circuit Decision to reinvigorate U S WEST's universally rejected position that it is entitled to refuse to allow competitors to provide service using unbundled network elements.

C. U S WEST'S PROPOSAL IS INCONSISTENT WITH THE ACT, THE FCC RULE, THE EIGHTH CIRCUIT DECISION, AND THE DEVELOPMENT OF EFFECTIVE COMPETITION IN ARIZONA.

U S WEST proposes that the Arbitrators ignore 47 C.F.R. § 51.315(b), and allow U S WEST to refuse to provide unbundled network elements in existing combinations based on U S WEST's interpretation of the Eighth Circuit Decision. The Arbitrators should reject this proposal as inconsistent with the Act, the FCC Rules, the Eighth Circuit Decision, and the development of effective competition in Arizona.

1. U S WEST's Proposal Would Impose Unwarranted and Artificial Additional Costs on Competitors and Consumers.

U S WEST's proposal is blatantly anticompetitive, and even U S WEST cannot identify any remotely legitimate purpose it would serve. When a competitor orders elements that in the ordinary course are already combined within the ILEC's network, the incumbent does not need to undertake any physical disconnection/connection activities within that combination in provisioning the order. Yet, under U S WEST's proposal, the ILEC would be permitted first to sever existing connections between elements -- for example, to visit the

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elements purchased from the incumbent that are not incurred when the requesting carrier simply resells an incumbent's services. 1997 W.L. at *26.

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customer's premises and disconnect the loop from the network interface device -- and then require the requesting carrier to undertake the pointless task of reconnecting those elements. That proposal not only would create enormous, wasteful, and discriminatory inefficiencies, but it also has no other conceivable purpose than to substantially increase the costs of competitive entry and the costs to consumers of availing themselves of a competitor's services.

Such "make work" also undermines the efficiencies inherent in the use of U S WEST's existing network. U S WEST engineers would disassemble the network only to have new entrants' engineers reassemble it. This procedure would substantially hamper the ability of AT&T and other new entrants to provide prompt service to their customers using existing combinations of U S WEST unbundled network elements. This process also imposes significant unwarranted and artificial additional costs, all of which U S WEST would expect AT&T, MCImetro, or other new entrants to pay.[3]

2. U S WEST's Proposal Would Require Substantially More Access to U S WEST's Network Than Is Currently Authorized.

U S WEST's proposal would also require that AT&T and other new entrants' engineers have virtually unlimited access to U S WEST's network. As the Eighth Circuit observed in connection with its decision to vacate subsections of Rule 51.315, "the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants

[3] Of course, U S WEST's proposal does not include a procedure for the return of the elements if the customer discontinues service with the new entrant or the new entrant constructs its own facilities to serve that customer. To ensure nondiscrimination, the new entrant would disassemble the U S WEST network elements and return them as they were provided, requiring U S WEST to reassemble them. Based on U S WEST's positions in this and other proceedings, however, U S WEST can be expected to require that competitors and/or captive ratepayers absorb these costs.

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access to their networks than have to rebundle the unbundled elements for them." Eighth Circuit Decision at *25. But U S WEST has shown no inclination to allow non-U S WEST personnel anywhere near its network. U S WEST thus proposes that new entrants be required to recombine network elements that U S WEST has separated without allowing new entrants access to those elements to recombine them.

3. U S WEST's Proposal Is Discriminatory in Violation of the Act and the FCC Rules and Order.

U S WEST's proposal, in addition to violating FCC Rule 51.315(b), would also violate the nondiscrimination requirements of Section 251(c)(3) of the Act and the FCC Rules implementing these requirements. In particular, U S WEST's position is independently precluded by a number of pertinent FCC regulations that were upheld and that implement the first sentence of section 251(c)(3), which requires incumbent LECs to provide "nondiscriminatory access to network elements."

The first such regulation is 47 C.F.R. § 51.307(b). That regulation expressly provides: "The duty to provide access to unbundled elements . . . includes a duty to provide a connection to an unbundled network element independent of any duty to provide interconnection pursuant to this part and section 251(c)(2) of the Act." As the FCC explained, this regulation makes clear that "requesting carriers seeking access to network elements" need not own any "local exchange facilities" of their own, and was promulgated specifically to preclude the very argument advanced by U S WEST -- that "new entrants [are] prohibited from requesting two network elements that are connected to each other because the new entrant [must] connect [each] network element to a facility of its own." FCC Order ¶ 329.

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U S WEST's proposal is similarly precluded by 47 C.F.R. § 51.309(a). That binding regulation prohibits an ILEC from imposing "limitations, restrictions, or requirements on requests for . . . unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service." Because competitors will lack adequate information about the incumbent's network and would lack the resources to reassemble all of the elements of the network that had previously been combined by the ILEC over a period of years, U S WEST's proposal would undoubtedly have the effect of impairing a competitor's ability to offer services by purchasing combinations of network elements, and is thus prohibited by Rule 51.309(a).

U S WEST's position would also squarely violate 47 C.F.R. § 51.313(b). That Rule expressly and unambiguously mandates that "the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements . . . shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself." When an incumbent LEC uses its network elements that are already combined, it obviously does not incur the pointless expense of ripping them apart, inserting unnecessary new facilities, and then reassembling the elements. But under U S WEST's reading of the Eighth Circuit Decision, requesting carriers would have to rent massive amounts of collocation space in every U S WEST central office to house potentially thousands of individual cross-connects and related facilities and would have to employ armies of technicians to install and remove those individual cross-connects every time a customer switches carriers -- for no reason but U S WEST's desire to raise its potential rivals' costs and thereby protect its monopoly. The massive inefficiencies this

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approach would introduce would plainly be discriminatory -- even apart from U S WEST's illegal attempt to condition access on the requesting carrier's willingness to collocate equipment at U S WEST's central offices. Accordingly, any attempt to subject requesting carriers alone to that needless expense would be patently unlawful under 47 U.S.C. § 251(c)(3) and 47 C.F.R. § 51.313(b).

Contrary to U S WEST's suggestion, the Eighth Circuit's decision to vacate FCC Rule 51.315(c)-(f) has no bearing on whether U S WEST may refuse to provide existing combinations of unbundled network elements. These subsections address the situation in which a requesting carrier seeks to order elements of an incumbent's network that are not currently combined in the ordinary course, or to combine some elements with the requesting carrier's own facilities. In that situation, an incumbent would normally incur real costs that are in addition to those that the incumbent would normally incur in building, operating, and maintaining its network. Indeed, U S WEST and other ILECs argued to the Eighth Circuit that requiring the ILEC to combine network elements in new combinations would "forcibly conscript incumbents' personnel" and "turn incumbent LECs into forced-labor construction companies for new entrants." Iowa Utils. Bd. v. FCC, Brief for Petitioners at 60-62. Although the Eighth Circuit concluded that "the Act does not require the incumbent LECs to do all of the work" of combining network elements, Eighth Circuit Decision at *25, that holding obviously has no application to the very different question at issue here.

U S WEST's refusal to provide network elements in the combined form in which they ordinarily are found in the network, and to require competitors to engage in the needless and wasteful task of "recombining" them, can only be designed for one purpose: to thwart

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altogether the ability of competitors to enter the market by purchasing unbundled network elements. That result would patently violate the terms and purposes of the Act, and, more fundamentally, would prevent consumers from receiving the promised benefits of meaningful competition -- i.e., choices of services from multiple providers at competitive prices.

III. CONCLUSION

U S WEST's proposal to disconnect unbundled network elements from existing requested combinations is discriminatory, would require exponentially higher access by competitors to U S WEST's network, and would impose service delays and enormous unwarranted and artificial additional costs on new entrants, as well as on Arizona consumers. U S WEST, therefore, once again effectively requests that the Arbitrator ignore the law and impose burdensome and unwarranted requirements that would severely impede the ability of all new entrants -- not just AT&T -- to provide local exchange service, stifling the development of effective competition in Arizona.

In sum, the Arbitrator's decision requiring U S WEST to provide unbundled network elements in existing combinations is consistent with the Act, the FCC Order and Rules, and the Eighth Circuit decision. The Arbitrator, therefore, should deny U S WEST's request to revisit resolved issues or alter the language in the Interconnection Agreement.

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Exhibit 1

3.2.15 Specific Unbundling Requirements

3.2.15.1 AT&T may order ~~and U S WEST shall provision~~ unbundled Network Elements either individually or in any combination on a single order. AT&T may order ~~and U S WEST shall provide~~ Unbundled Network Elements without restriction as to how those elements may be rebundled.[3] U S WEST need not perform functions necessary to combine Unbundled Network Elements, however, upon request, U S WEST shall not separate Unbundled Network Elements that are presently combined.

[3] MCIm Order, p.11 at Issue 14 and AT&T Order, p. 13 at Issue 25.